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Case note

R (on the application of UNISON) v Lord Chancellor: A masterclass in the constitutional right of access to the courts

Emily Rose*

Subject: Access to justice

Key words: Employment tribunals; fees; access to justice; discrimination

Case: *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 (26 July 2017)

Introduction

In July 2013 the government introduced fees to be payable by claimants for cases taken to an Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT). The main justification for introducing fees to the previously free service was to pass on costs to the users of those services. However, the trade union UNISON (amongst others) considered fees to constitute a barrier to workers' access to justice. This case represents UNISON's third judicial review proceeding challenging the validity of these fees. At issue was whether the fees imposed by the Lord Chancellor were unlawful because of the effects on access to justice.

Facts

By virtue of section 42(1) of the Tribunals, Courts and Enforcement Act 2007, the Lord Chancellor has a statutory right to order fees to be payable in ETs and the EAT.¹ This right was put into effect by way of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (the Fees Order),² which came into force on 29 July 2013. The Fees Order made an 'issue fee' and a 'hearing fee' payable in respect of any claim presented to an ET and any appeal to the EAT. The total amount payable to have a case heard in an ET was set at £390 or £1,200, depending on whether it was a Type A or Type B claim. A distinction was made based on the nature of the claim; in particular its complexity and the associated time and resources it required of ETs. The total amount payable to have a case heard in the EAT was £1,600. Full and partial remission was available to eligible

*Law School, University of Strathclyde

¹ This provides that the Lord Chancellor may by order prescribe fees payable in anything dealt with by a First-tier, Upper or 'added' tribunal. Section 42(3) defines an 'added tribunal' as a tribunal specified in an order made by the Lord Chancellor. The ET and EAT were specified as such by the Added Tribunals (Employment Tribunals and Employment Appeal Tribunal) Order 2013 (SI 2013/1892).

² SI 2013/1893.

claimants.³ Further, the Fees Order provided that a fee may be remitted by the Lord Chancellor in exceptional circumstances.⁴

The first suggestion that fees would be payable for employment disputes emerged in the Beecroft Report published in 2012.⁵ This report reviewed employment laws and regulation with the intention of bringing about a reduction in the government deficit through economic growth. It recommended steps aimed at reducing the number of claims being made to ETs, including the introduction of fees.⁶ This fitted well with the Coalition government's neo-liberal agenda and its efforts to eliminate 'red tape' for business.⁷

The introduction of fees, then, was justified on the basis that the fees would transfer some of the cost burden from general taxpayers to the users of ETs.⁸ In the government's cost benefit analysis, the assumption was made that "ET and EAT use does not lead to gains to society that exceed the sum of the gains to consumers and producers of these services."⁹ Further, it was claimed that the fees would incentivise earlier settlements and dis-incentivise the pursuing of weak and vexatious claims.

Distinct changes in ET claimant behaviour emerged after the Fees Order. There was a long-term reduction in claims accepted by ETs in the order of 66-70% from the pre-fee figures.¹⁰ The reduction was most notable with respect to claims of low value or where a financial remedy was not sought.¹¹ The proportion of claimants receiving remission was lower than anticipated¹² and the Lord Chancellor's discretionary power to remit fees in exceptional circumstances was exercised rarely.¹³ A survey undertaken by Acas (the Advisory, Conciliation and Arbitration Service) found that

³ Provided by Article 17 and Schedule 3 of the Fees Order, and substituted by the Courts and Tribunals Fee Remissions Order 2013 (SI 2013/2302).

⁴ Paragraph 16, Schedule 3 of the Fees Order.

⁵ Adrian Beecroft, *Report on Employment Law*, (24 October 2011, 12/825), 7-8, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31583/12-825-report-on-employment-law-beecroft.pdf [Accessed 26 September 2017].

⁶ *Ibid.*, 8.

⁷ 'The Red Tape Challenge: Employment Law' at <http://webarchive.nationalarchives.gov.uk/20150522175321/http://www.redtapechallenge.cabinetoffice.gov.uk/themehome/employment-related-law/> [Accessed 8 September 2017].

⁸ Department for Business, Innovation & Skills and the Tribunals Service, *Resolving Workplace Disputes: A Consultation* (January 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31435/11-511-resolving-workplace-disputes-consultation.pdf [Accessed 8 September 2017]. See also Ministry of Justice, *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* (14 December 2011, Consultation Paper CP22/2011), https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/supporting_documents/chargingfeesinetandeat1.pdf [Accessed 8 September 2017].

⁹ *Impact Assessment*, prepared on behalf of the Ministry of Justice (IA No. TS 007, 30 May 2012), <https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/results/et-fees-response-ia.pdf>, paragraph 4.88, footnote 50 [Accessed 8 September 2017].

¹⁰ *R v Lord Chancellor* [2017], paragraphs 38 and 39.

¹¹ *Ibid.*, paragraphs 40 and 41.

¹² As per the *Impact Assessment*, n. 6.

¹³ This was done 31 times during the period 1 July 2015 to 30 June 2016 (during which period 86,130 individual claims were presented), *R v Lord Chancellor* [2017], paragraph 44.

claimants who were unable to resolve employment disputes through conciliation but who did not go on to issue ET proceedings were put off doing so by fees.¹⁴ More than two-thirds of these survey respondents stated that they could not afford the fees, while others reported that the fees were more than they were prepared to pay or that the value of the fee equalled the money they were owed.

Judgment

The court held in favour of the appellant on the basis that the Fees Order was an unlawful exercise of the Lord Chancellor's powers under section 42(1) of the Tribunals, Courts and Enforcement Act 2007 because the prescribed fees interfered unjustifiably with the right of access to justice under common law and EU law. Lord Reed provided the unanimous judgment. Lady Hale provided an addendum regarding discrimination issues in which she determined that the higher charge for Type B claims indirectly discriminated against women.

Earlier challenges to the legality of the Fees Order brought by UNISON were argued primarily on the basis that it violated the EU principle of effectiveness. The High Court concluded that breaching this principle required the fees to be so high that a prospective litigant was clearly unable to pay them.¹⁵ The Court of Appeal considered that interference with the principle required that it be impossible in practice to access the tribunal because it is unaffordable.¹⁶ The lower courts dismissed UNISON's claims.

The court in the present case took a somewhat different approach to the issue of access to justice. It observed: "Before this court, it has been recognised that the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law."¹⁷ As such, arguments were primarily made on the basis of this common law right.

The court spent time highlighting the importance of the constitutional right of access to justice to courts and tribunals. It observed that the constitutional right played a critical role in maintaining the rule of law, including ensuring that the executive branch of government carries out its functions in accordance with those laws.¹⁸ The constitutional right was also noted to have benefits beyond the immediate parties to society as a whole by establishing principles of general importance that influence the actions of many.¹⁹

¹⁴ Acas, *Evaluation of Acas Early Conciliation 2015* (Research Paper 04/15), <http://m.acas.org.uk/media/pdf/5/4/Evaluation-of-Acas-Early-Conciliation-2015.pdf> [Accessed 8 September 2017].

¹⁵ *Unison, R (on the application of) v The Lord Chancellor & Anor* [2014] EWHC 218 (Admin); [2014] ICR 498; *Unison (No 2), R (on the application of) v The Lord Chancellor* [2014] EWHC 4198 (Admin); [2015] ICR 390.

¹⁶ *Unison, R (On the Application Of) v The Lord Chancellor* [2015] EWCA Civ 935; [2016] ICR 1.

¹⁷ Paragraph 64.

¹⁸ Paragraph 68.

¹⁹ Paragraphs 69-73.

Moreover, the court emphasised the long history of the constitutional right of access to the courts in English law. Reference was made to the Magna Carta of 1215—“We will sell to no man, we will not deny or defer to any man either Justice or Right”²⁰—the writing of Sir Edward Coke in the 1620s,²¹ and Blackstone in the 1760s.²² More recent authority was noted²³ that affirmed the need for clear statutory enactment to limit or hinder the constitutional right.²⁴ Further, any such statutory enactment can only intrude on the right as is reasonably necessary to fulfil the objective of the provision in question.²⁵ In *R v Lord Chancellor, Ex p Whitham*,²⁶ it was held that there were implied limitations upon the Lord Chancellor’s discretion regarding court fees that did not “permit him to exercise the power in such a way as to deprive the citizen of what has been called his constitutional right of access to the courts.”²⁷ Moreover, in *R (Hillingdon London Borough Council) v Lord Chancellor (Law Society intervening)*,²⁸ it was observed that the lawfulness of the fees order in question depended on “whether there was a real risk that the increase in fees will cause [the claimants—in this case local authorities] not to make applications which objectively should be made.”²⁹

In the present case, the court concluded that the Fees Order prevented some persons from having access to justice. To be lawful, the fees needed to be set at a level that everyone can afford, taking into account the availability of fee remission.³⁰ Applying *Hillingdon*,³¹ the court determined that it is sufficient if a real risk that people cannot afford to make employment claims is demonstrated. The sharp and sustained drop in the volume of cases taken to ETs was considered evidence of this. The court rejected the Lord Chancellor’s argument that people could afford fees if they reduced other areas of non-essential spending.³² It reiterated that fees must be *reasonably* afforded and not simply hypothetically afforded. The court also observed that the fees can render it futile or irrational to bring a claim.³³ Evidence provided of the steep drop in low value and non-monetary claims, together with evidence of the difficulty in receiving full payment of claims awarded, supported this conclusion.

²⁰ Chapter 40, which remains in on the statue book in chapter 29 of the version issue by Edward I in 1297 (referred to at paragraph 74).

²¹ Refer part 2 of the *Institutes of the Laws of England*, published posthumously in 1642 (referred to at paragraph 75).

²² Refer Book I, Chapter 1, ‘Absolute Rights of Individuals’, 1765-1769 (referred to at paragraph 75).

²³ Paragraphs 76-79.

²⁴ *Attorney General v Times Newspapers Ltd* [1974] AC 273, 310 and *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909, 977; *Raymond v Honey* [1983] 1 AC 1; and *R v Secretary of State for the Home Department, Ex p Anderson* [1984] QB 778.

²⁵ *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198; *R v Secretary of State for the Home Department, Ex p Simm* [2000] 2 AC 115; and *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 (referred to at paragraphs 80-82).

²⁶ [1998] QB 575.

²⁷ [1998] QB 575, 580.

²⁸ [2008] EWHC 2683 (Admin); [2009] 1 FLR 39.

²⁹ *Ibid.*, paragraph 61.

³⁰ Paragraph 91.

³¹ [2008] EWHC 2683 (Admin); [2009] 1 FLR 39.

³² Paragraph 93.

³³ Paragraph 96.

Further, applying *Daly*,³⁴ the court rejected the claim that the Fees Order could be justified as a necessary intrusion on the right of access to justice. The court noted that the fees did meet the government's primary aim of transferring of the cost burden to users of the system to a limited degree.³⁵ However, it considered that it did not follow that fees which intruded to a lesser extent upon the right of access to justice would have been any less effective in meeting this aim.³⁶ The secondary aims of incentivising earlier settlements of employment disputes and dis-incentivising weak and vexatious claims were not supported by evidence.³⁷

The court then went on to consider the rights enforceable in ETs that have their source in EU law. It conceptualised the EU principle of effectiveness somewhat differently from the lower courts stating the relevant question to be "whether the limitation of the right to an effective remedy resulting from the Fees Order respects the essence of that right and is a proportionate means of achieving the legitimate aims pursued, or has a led to an excessive burden being placed on individuals who seek to enforce their rights."³⁸ Given the above reasoning by the court that the fees are unaffordable by some people and are so high as to prevent claims for small amounts or non-monetary claims, it was concluded that the Fees Order imposes limitations on the exercise of EU rights that are disproportionate. As such, the Fees Order is unlawful under EU law.

Lady Hale considered whether the higher fees payable for Type B claims was indirectly discriminatory against women because more women bring these claims. The Court of Appeal had accepted that there was a disparate impact on women. However, it considered this to be justifiable under subsection 19(2)(d) of the Equality Act 2010 on the basis that it was legitimate to charge more for what was assumed to be a more costly service.³⁹ Lady Hale took a different approach to this subsection identifying the relevant question to be "whether charging of higher fees for Type B claims is consistent with the aims of the Fees Order as a whole."⁴⁰ Here, of course, she was referring to the transferring of costs to users of ETs, encouraging earlier settlements, and deterring unmeritorious claims. Lady Hale noted, referring to the findings of Lord Reed, that it had not been shown that the higher fee charged for Type B claims was more effective in transferring the cost of the service from taxpayers to users.⁴¹ Nor had the other aims of the Fees Order been met due to the charging of higher fees.

Impact

This case represents a hugely important decision that affirms the necessity of adequate of access to justice. The judicial reasoning articulated is something of a master class in the constitutional right of access to the courts that has emerged over centuries of development in the common law. The

³⁴ [2001] UKHL 26; [2001] 2 AC 532.

³⁵ Paragraphs 56 and 99.

³⁶ Paragraph 100.

³⁷ Paragraphs 57-90 and 101.

³⁸ Paragraph 116.

³⁹ Paragraph 127.

⁴⁰ Paragraph 128.

⁴¹ Paragraph 130.

judgment is timely as it comes after years of government austerity measures that have placed a myriad of pressures on the practical effectiveness of seeking redress in the courts and tribunals, especially for the vulnerable in society.⁴²

The relevance of these lessons are particularly important when it comes to employment disputes. The neo-liberal political agenda of recent decades has seen a framing of workers' pursuance of employment claims as variously: a drag on businesses' ability to grow and prosper;⁴³ a burden on taxpayers' money;⁴⁴ and a means for workers to unjustifiably cause difficulties for employers.⁴⁵ Moreover, an individualised perspective of employment disputes has become the norm. Such an approach fails to recognise the broad inequalities of bargaining power that exist between employers and workers and how effective legal redress for employment issues is vital for *all* workers.⁴⁶ The court's judgement redresses some of the political rhetoric and practices that have threatened access to justice in employment disputes. Importantly, it does so in a way that rises above ideological agendas and instead reminds us of the broader issues at stake when access to courts and tribunals are compromised.

The way in which the judgment relied almost entirely on the common law, with EU law framed as reaffirming the long held position in England, is also important. The UK's pending departure from the EU will not alter the strength of the arguments made with respect to the constitutional right of access to the courts.

Some immediate issues arise from the fact that the court made the Fees Order unlawful *from the date that it was made*. These concern the reimbursement of fees already paid and those claims that were rejected or dismissed for non-payment of fees. The President of Employment Tribunals (Scotland) made a Case Management Order to the effect that these matters will be dealt with shortly in accordance with administrative arrangements to be announced by the Ministry of Justice and Her Majesty's Courts and Tribunals Service.⁴⁷ Would-be claimants who decided not to pursue claims because of fees appear less likely to have recourse for the lost opportunity of making a claim.

⁴² E. Palmer, T. Corford, A. Guinchard and Y. Marique (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Oxford and Portland, Oregon: Hart, 2016).

⁴³ L. Dickens, "Fairer Workplaces: Making Employment Rights Effective" in *Making Employment Rights Effective: Issues of Enforcement and Compliance*, ed. L. Dickens (Oxford: Hart, 2012).

⁴⁴ For example, the statement by Justice Minister Shailesh Vara (28th July 2014) that it is not right that "hardworking taxpayers should pick up the bill for employment disputes in tribunals" and that "It is reasonable to expect people to pay towards the £74m bill taxpayers' face for providing the service."

⁴⁵ Business Secretary Vince Cable spoke about "a widespread feeling it is too easy to make unmerited claims" (November 2011), <https://www.gov.uk/government/speeches/reforming-employment-relations> [Accessed 28 September 2017].

⁴⁶ N. Busby and M. McDermont, "Access to Justice in the Employment Tribunal: Private Disputes or Public Concerns" in *Access to Justice: Beyond the Policies and Politics of Austerity* (E. Palmer, T. Corford, A. Guinchard and Y. Marique, eds) (Oxford and Portland, Oregon: Hart, 2016)

⁴⁷ Employment Tribunals (Scotland), *Case Management Order of the President (No. 2)*, (18 August 2017) <https://www.judiciary.gov.uk/wp-content/uploads/2015/03/case-management-order-no-131-president-employment-tribunals-scotland-re-unison-2-20170818.pdf> [Accessed 11 October 2017]

There remains, of course, the risk that fees may again be introduced for claims made to ETs and the EAT.⁴⁸ The judgment recognised that the government aims underpinning the Fees Order were legitimate.⁴⁹ The Lord Chancellor could apply the lessons from the judgment in any revised effort to introduce fees. However, Scotland may remain exempt from this. The Scottish government has made a public statement against ET fees.⁵⁰ It pledged to abolish fees once ETs have been devolved, viewing it as vital to “ensuring that employees have a fair opportunity to have their case heard.”⁵¹

⁴⁸ See also D. Robertson, ‘Price out of Justice’, *The Journal of the Law Society of Scotland* (19 September 2017), <http://www.journalonline.co.uk/Magazine/62-9/1023757.aspx> [Accessed 11 October 2017].

⁴⁹ Paragraph 86.

⁵⁰ The Scottish Government, *A Stronger Scotland: The Government’s Programme for Scotland 2015-16* (September 2015), <https://beta.gov.scot/publications/programme-government-2015-16/> [Accessed 26 September 2017].

⁵¹ *Ibid.*, 3.